In the Supreme Court.

CHARLES E. MILLER and DANIEL G. ROLLINS, Executors of Chester A. Arthur, deceased, late Collector of the Port of New York, AGAINST CHARLES B. RICHARD and EMANUEL BOAS.	Oct. T., 1888. No. 1179.

BRIEF IN BEHALF OF DEFENDANTS IN ERROR.

Statement.

In 1876 one Lutton imported and entered at the Port of Philadelphia eight cases of merchandise upon two entries, one for consumption and the other seven for warehouse. These goods were regularly examined and appraised by the proper customs officers at Philadelphia and the duties ascertained and liquidated according to the invoice and entry.

On the one case for consumption the duties were paid and Lutton received the goods (Record, p. 8).

On December 13th, 1876, said seven cases were withdrawn for transportation and were transported in bond from Philadelphia to the City of New York, consigned to the plaintiffs, C. B. Richard & Boas.

Upon the arrival of the goods at New York City the plaintiffs made rewarehouse and withdrawal entry thereof with the collector at that port in the usual form, and thereupon paid to the original defendant, the Collector at New York City, the duties and charges upon said goods as liquidated by the Collector at the Port of Philadelphia, and all but one of said cases were then and there delivered by the defendant to the plaintiffs. The entered value at New York was, as the treasury regulations require, the same as that entered, appraised and liquidated at Philadelphia.

The one case that was not delivered to the defendants in error was sent by the collector to the appraiser at New York for examination and comparison.

The appraiser found the classification for duty to be the same rate as that upon which duty was assessed at Philadelphia, but he appraised the case before him at more than ten per cent. above the invoice and entered value at Philadelphia.

This invoice and entered value had been found correct by the Customs officers at Philadelphia, and the original entry so liquidated.

The entire return of the New York appraiser was as follows:

"M. F. P. 503. Case as noted. Balance classified December 30, 1876. Add to make market value as noted. Correct footing of invoice at prices as entered. A. Gilbert. Approved: S. B. French, Appraiser."

These notations of addition to value, as before stated, exceeded the entered value by more than ten per cent.

Thereupon the Collector at New York, whose executors are the present plaintiffs in error, proceeded to assess duties upon the whole seven cases upon an equivalent advance upon the six cases not seen by the appraiser; and also an additional twenty per cent.

duty upon the whole entry according to the valuation of the New York appraiser.

This sum the defendant in error paid under protest and brought suit to recover the amount so paid.

The goods in question were withdrawn from warehouse in Philadelphia and shipped to New York under a transportation bond December 13, 1876, entered on arrival in New York upon a combined rewarehouse and withdrawal entry and six of the seven cases immediately delivered to the defendants in error, the collector retaining one case for examination, and these six cases were never after in the custody of the Customs officers (Record fols. 19, 27).

Two protests were filed by defendants in error, the first in August, 1877, calling attention of the Collector in general terms to their claim is to be found at fol. 26 of the record. The second, made within ten days after the formal liquidation of the entry, was filed March 7, 1878, and is set out on pages 9 and 10 of the record.

The grounds stated in that protest are the grounds upon which the defendants in error now rely to sustain the judgment of the Court below in their favor.

ARGUMENT.

I.

There is no statutory provision for the appraisal of entered merchandise or for the assessment of duty thereon at any other place than at the port of original entry, or by any other officers than the proper Customs Officers at such port.

Our protest claimed

"The goods in question having been entered and appraised at Philadelphia and there liquidated, no greater amount of duties can be demanded of us than the amount determined by that liquidation.

"The appraiser at New York had no power or authority to determine the value of the goods in question for the purpose of assessing duties.

"Your liquidation of March 2, 1878, is without authority in law."

This claim is based upon the absence of statutory authority, and upon the well-settled principles that authority to exact a tax by any one cannot be presumed but must be shown.

This position is fortified also by the Treasury Regulations upon this subject.

The regulations of 1874 then in force provided as follows:

"Art. 628. Merchandise may be withdrawn from warehouse in any quantity not less than an entire package, or one ton in weight if the merchandise be in bulk, at any time within three years from date of original importation for transportation from one port or place to another in the United States, in bond, in the original packages in which the same were imported, and the quantities allowed to be imported into the United States by law.

"Merchandise shall not be entered for such transportation or withdrawn from warehouse on such entry, *until all the examinations and returns have been made, and the dutiable value and duties definitely fixed.*

"If, on examination by the appraisers, the merchandise be found to be undervalued in the entry, and the penal additional duty of twenty per cent. incurred, such duty must be paid before any withdrawal entry of the merchandise for transportation can be allowed."

"Art. 632. The entry shall be in triplicate, and, when made by other than the original importer, his authorization is requisite, as in case of withdrawal for consumption.

"If the transportation be by land, or partly by land and partly by water, the particular railroad or other route must be designated, which route must be in accordance with the regulations relating thereto. The party making the entry shall also present a copy of so much of the original invoice as relates to the merchandise, if package goods, described in such entry, or if

other than package goods, a literal copy or translation of the entire invoice, and attached to the entry.

" The entry, having been compared with the record of the original warehouse entry, as provided in case of entry for consumption, entered in the appropriate column in the warehouse account, and the warehouse bond number endorsed thereon, and having also been compared and entered in the books of the naval officer, and the duties payable having been estimated and the foregoing oath taken by the party making entry, the collector will take a bond (Form No. 131) in a penal sum equal to double the duties chargeable on the goods, but not in any case less than one hundred dollars.

" The amount of estimated duties is to be endorsed upon the bond.

" Art. 638. To enable the proper entry for rewarehousing to be made, the Collector of the Port where the goods are withdrawn will transmit promptly to the Collector of the Port for which they may be destined the triplicate copy of the transportation entry, with a copy of the invoice attached. The copy of invoice will be prepared in the Collector's office, and will be duly certified as such, *and have transcribed upon it the report of the appraisers, or of the officers who acted as appraisers of the merchandise.*"

" Art. 644. Goods transported under bond from one port of the United States to another, and arriving in advance of the transportation papers, or which from any cause are not duly and promptly entered for rewarehouse on arrival at the port of destination, are to be taken possession of by the Collector and kept as unclaimed goods."

From this regulation it will be seen that no entry could have been on the original invoice used in Philadelphia. The papers as settled and liquidated there must be used in New York.

" Art. 647. On receipt of the permit, endorsed as above, the same examination shall be had as is required by law on importations of merchandise from foreign ports, in which the appraisers shall have reference as well to the valuation and classification of such merchandise as to its identity with that described in the

certified copy of invoice accompanying the transportation entry; and they shall accordingly appraise and estimate the same in the manner required by law in case of merchandise arriving from foreign ports, and make due report thereof to the Collector."

"Should it appear by such report that the merchandise was improperly classified or appraised at the original port of entry, *the collector will call upon the appraisers for a statement of the grounds of their opinion, and immediately transmit the same, with a copy of their report, to the Secretary of the Treasury.*

To enable the appraisers to act understandingly in the examination and appraisement of merchandise transported under bond, collectors transmitting the same will see that *the copy of invoice required to accompany the transportation entry conforms in all respects to the original document.*

"*Collectors are not authorized to make a new assessment of duties upon such appraisement; but in case of a variance, they will promptly advise the Secretary of the Treasury of the facts, and retain the goods until instructed.*"

This regulation was not complied with by the Collector at New York.

"Art. 650. The value and duty as assessed at the port of original importation, and so stated in the triplicate copy of transportation entry forwarded to the port of destination, *will in all cases be the value and duty to be charged on the rewarehouse entry;* or, if the merchandise be withdrawn immediately on arrival, to the rewarehouse withdrawal entry, as the voucher and authority for the assessment of duty. Should there be found any clerical error in the entry or invoice, it shall be corrected, entry allowed, and the fact reported to the collector at the port of withdrawal.

"*But should any difference in valuation or classification be reported by the appraisers, the case will be reported to the Secretary of the Treasury, the collector* at the port of withdrawal duly notified of the fact, and *the entry, in the meantime, suspended.*

II.

Plaintiffs' tenth ground of protest as follows:

"No additional or enhanced duty could legally accrue by reason of an enhanced valuation of these goods under the circumstances, except by the action of the appraiser at Philadelphia upon a re-examination of said goods by him."

was based upon the non-compliance of the Collector at New York with the provisions of Articles 647 and 650 of the regulations of the Treasury Department as to obtaining the reasons of the appraiser at New York and as to notifying the officers at the port of original entry, and the Department.

III.

We call the attention of this Court to the decision of Judge LOWELL in the case of Spring vs. Russell, 1 Lowell, 258, as fully sustaining the positions above taken. The case arose before the Revised Statutes, but a careful comparison of the Statutes and Regulations then in force will show them to be substantially identical with those applicable to the case under consideration.

In that case, although the appraiser at the original port of entry concurred in the advances in the value made at the port of rewarehousing, yet Judge LOWELL could not sustain the exaction.

On the exact point in issue here, the power of the Collector and appraiser at the port of rewarehousing (in the case at bar, New York), he said:

"The next question is whether the addition to the invoice value could be properly made by the ap-

praisers here, and whether thereupon the defendant could and did lawfully assess and levy the additional duty. The regulations of the Treasury Deparment, already referred to, and especially Arts. 460 and 463, provide that a copy of the entry for transportation and of the invoice shall be sent to the Collector here, and that he shall cause the goods to be again appraised in the same manner as if on an importation from a foreign port, and if it should appear by the report of the appraisers that the appraisement at the original port was too low, or the classification was improper, the Collector shall call upon the appraisers for a statement of the grounds of their opinion, and transmit the same to the department for its consideration, and such investigation as may be necessary. These rules were not followed in this case. Instead of reporting to the department, the defendant reported to the Collector at Ogdensburg, and upon his assenting to the addition, proceeded to assess the duty. We understand that this action of the defendant was in accordance with the practice at this port, and very possibly at others in like cases, but we have not been informed of any general regulation of the department which authorized it. Whether the Secretary of the Treasury could by a general rule, lawfully authorize an assessment of duties upon the basis of an appraisement made at the port of entry for rewarehousing may admit of great doubt. We have seen no law which warrants any such proceeding, but on the contrary all the statutes appear to contemplate that the appraisal shall be at the port of original entry. It may be highly useful that a second appraisement should be made as a guard against fraud, and to secure, through the supervision of the department, that most important result, uniformity of action at all the ports of entry; and such we suppose to be the true object of the general regulations above referred to; but that the new appraisement can supersede or supplement the old in the action of the collector in the particular case, in the absence of fraud or collusion, is a proposition that we should be obliged to examine with great care, if this case required it; but it does not, for the regulations do not purport to authorize the action taken in this case" (Spring vs. Russell, 1 Lowell, pp. 258, 261).

IV.

There could under the circumstances have been no valid appraisal of goods not seen by the appraiser.

The provision for an examination of one package in ten is limited to the port at which the goods are imported, *vide* Rev. Stat., Sec. 2901.

The proper remedy then of the defendants in error was by protest, appeal and suit, and not by calling a merchant appraisal.

Without the possession of the goods themselves such re-appraisal could not be had and *ex necessitate* neither could the Collector at New York cause an appraisal.

Before he acted six out of the seven cases had gone into consumption (Record, fol. 27).

V.

Defendants in error also protested specifically against the assessment of twenty per cent. additional duty.

See Record, p. 10, top.

This additional duty only accrues by force of Sec. 2900 of the Revised Statutes, as follows :

" The owner, consignee, or agent of any merchandise which has been actually purchased, or procured otherwise than by purchase, at the time, and not afterward, when he shall produce his original invoice to the collector and make and verify his written entry of his merchandise, may make such addition in the entry to the cost or value given in the invoice as in his opinion may raise the same to the actual market value or wholesale price of such merchandise at the period of exportatien to the United States in the principal markets of the country from which the same has

been imported; *and the collector within whose district the same may be imported or entered may cause such actual market value or wholesale price to be appraised; and if such appraised value shall exceed by ten per centum or more the value so declared in the entry,* then, in addition to the duties imposed by law on the same, there shall be collected a duty of twenty per centum *ad valorem* on such appraised value. The duty shall not, however, be assessed upon an amount less than the invoice or entered value."

It is submitted that the only collector having power to order the appraisal therein provided for was the collector of Philadelphia, where the goods were imported and entered.

However that may be, the goods having been entered at that port and the Collector there having acted all other collectors as to proceedings under this section were thenceforth *functus officii*.

Also it is clear under the transportation statutes and regulations before referred to, that the entry at the port of New York must be upon the papers and values as entered at Philadelphia.

It is submitted that the liability to the twenty per cent. additional duty is correlative to the privilege of adding to made market value on entry.

It is in fact a penalty for not making such addition where the importer ought to make an addition.

As the defendants in error could make no such addition on their rewarehousing and withdrawal entry at New York they were not liable to the penalty.

Art. 654 of the Treasury Regulations of 1874 provides a form of entry where a consignee of goods transported in bond from the port of original entry desires to pay duties and get possession of the goods immediately on arrival.

It is spoken of as a combined entry and is known as a "Rewarehouse and immediate withdrawal for consumption."

It was the form of entry used by the defendants in error in the present case, and the only one they could use.

The regulations then provide:

"In this case no rewarehouse bond will be required, but the duties, *which shall be the amount certified as payable on the triplicate entry, having been paid*, and a penal bond taken according to Form No. 86, the Collector will issue a permit for delivery, &c.

VI.

Section 21 of the Act of June 22, 1874, 18 Statutes at Large, page 186, provides:

"That whenever any goods, wares, and merchandise shall have been entered and passed free of duty, and whenever duties upon any imported goods, wares and merchandise shall have been liquidated and paid, and such goods, wares and merchandise shall have been delivered to t e owner, importer, agent, or consignee, such entry and passage free of duty and such settlement of duties shall, after the expiration of one year from the time of entry, in the absence of fraud and in the absence of protest by the owner, importer, agent, or consignee, be final and conclusive upon all parties."

The duties upon the goods in question were ascertained and liquidated by the Collector at Philadelphia on or prior to December 13, 1876 (Record, folio 19).

On that date the goods were withdrawn and transported in bond to New York.

Upon the arrival of the goods at the Custom House at New York City the plaintiffs made rewarehouse and withdrawal entry thereof in the usual form and thereupon paid to the defendant, the Collector at New York